82-1207

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANK J. VADINO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the refusal of the district court during *voir dire* to inquire as to whether the venirepersons would tend to believe the testimony of a law enforcement officer over that of an ordinary witness merely because the former is a law enforcement officer, constitutes a violation of Petitioner's Sixth Amendment right to be tried by an unbiased jury, where all but one of the Government's witnesses were law enforcement officers or agents.

II. Whether the Court of Appeals for the Eleventh Circuit erred in holding that it was not reversible error for the district court to refuse to instruct the jury that the burden of proving that Petitioner was not entrapped was upon the Government, where Petitioner asserted the entrapment defense and was tried in the former Fifth Circuit, which has held that such refusal is reversible error.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of the parties to the proceeding in this Court.

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PETITION FOR WRIT OF CERTIORARI

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A copy of the Judgment and Commitment Order of the United States District Court for the Southern District of Florida dated September 2, 1980 is contained in Appendix A. A copy of the Judgment Order of the United States Court of Appeals for the Eleventh Circuit below dated June 19, 1982 is contained in Appendix B. The Opinion of the Court is reported at 680 F.2d 1329, and a copy thereof is contained in Appendix C. A copy of the denial of Petitioner's petition for rehearing dated November 15, 1982 is contained in Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered and dated June 19, 1982. A petition for rehearing was denied by an Order dated November 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This is a petition for certiorari arising from the following facts. On July 14, 1980, Petitioner and a number of co-defendants was found guilty in the United States District Court for the Southern District of Florida, after a jury trial, of conspiracy to possess and distribute cocaine and methaqualone and related substantive offenses in violation of 21 U.S.C. §§841, 843, 846 and 924, as well as aiding and abetting in violation of 18 U.S.C. §2. The basis for federal jurisdiction in the District Court was 28 U.S.C. §1291.

Petitioner was sentenced on September 2, 1980 to eight years in prison and a special parole term of not less than three years. On June 19, 1982, the Court of Appeals for the Eleventh Circuit entered a judgment affirming Petitioner's convictions.

The jury trial in this case commenced on July 3, 1980. The district court conducted substantially the entire *voir dire* and refused several requests by Petitioner and others to inquire of the venirepersons as to whether they would tend to credit the testimony of a law enforcement officer over that of a lay witness merely because of the former's status as a law enforcement officer. (T. 86-90)[1]. All but one of the Government's numerous witnesses were law enforcement agents and the Government's case consisted mainly of the testimony of these agents, along with tape recordings of conversations made by undercover DEA agents and exhibits of drugs and related paraphenalia seized during the arrests and subsequent search of the residence.

The Government's evidence disclosed that an undercover informer, one Charles Allen, from the Philadelphia, Pennsylvania area introduced Petitioner to DEA undercover agents. (T. 573). As a result of the informer's

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1. T. refers to the transcripts of trial and is followed by the page number.

introduction, Petitioner negotiated with the agents for the distribution of drugs. After several discussions, a meeting was arranged at a house on Jack Rabbit Lane in Miami Lakes, Florida, where the drugs would be exchanged for the agreed upon price. (T. 287-335).

During the negotiations, the Government taped certain conversations which were ultimately played to the jury. At the final meeting, the agents observed the drugs and arrested Petitioner and others. (T. 35). No defendant testified at trial and Petitioner raised the defense of entrapment in opening statements and cross-examination of several Government witnesses, as well as in closing argument. (T. 219-224, 597-624, 1358-1369, and 1372). Because an issue of fact as to the existence of entrapment was raised by the defense, the district court charged the jury on entrapment, but refused Petitioner's repeated requests to instruct the jury that the burden of proving that Petitioners were not entrapped was upon the Government. (T. 1278-1279).

Petitioner was subsequently convicted on all counts leading ultimately to this petition.

I. There Is a Conflict Among the Federal Courts of Appeals Concerning an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

The Sixth Amendment insures a criminal defendant's right to trial by an impartial jury. To effectuate this guarantee, the defendant is entitled to a meaningful inquiry into a prospective juror's attitudes, background and prejudices. Petitioner submits that this right was denied him because the district court repeatedly refused to ask the prospective jurors whether they would tend to attribute more weight to the testimony of a law enforcement officer merely because of his official status, than to

the testimony of other witnesses. Only after the jury had already been selected and sworn in did the district court make a vague reference to the jury's role in crediting witness testimony. (T. 141-142, 1428).

The refusal to permit inquiry into this highly sensitive area of potential juror bias was particularly harmful to Petitioner because the Government's case was comprised almost entirely of law enforcement agents, and each defendant was granted only two peremptory challenges. The district court's post-jury-selection attempt to direct instead of elicit juror attitudes was not sufficient to vitiate the resulting prejudice.

Petitioner further asserts that there is a sharp split among the Circuits as to whether the failure to ask an identical or similar question constitutes reversible error. The First, Fourth, Fifth and Eight Circuits have held that the failure of a court to permit this type of inquiry does not constitute an abuse of discretion. *See, Gorin v. United States*, 313 F.2d 641 (1st Cir. 1963); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *United States v. Jackson*, 448 F.2d 539 (5th Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); *Ross v. United States*, 374 F.2d 97 (8th Cir. 1967). However, the D.C. Circuit, along with the Seventh, Ninth and Tenth Circuits have held that a court's refusal to make or permit such inquiries where the Government's case consists primarily of testimony from law enforcement officers, is an abuse of discretion requiring reversal. *See, Sellers v. United States*, 271 F.2d 475 (D.C. Cir. 1959); *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964); *United States v. Martin*, 507 F.2d 428 (7th Cir. 1974); *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979); *Chavez v. United States*, 258 F.2d 816 (10th Cir. 1958), *cert. denied sub. nomine Tenorio v. United States*, 359 U.S. 916 (1959).

In light of the constitutional importance of this question and the clear-cut disagreement existing among

eight Circuit Courts of Appeals, Petitioner respectfully submits that the issue is now ripe for final resolution by this Court, and that such resolution should favor the reasoning set out by the D.C. Circuit in *Sellers* and *Brown*, *supra*, and followed in the Seventh, Ninth and Tenth Circuits for the following reasons.

The rulings of the D.C. Circuit in *Sellers v. United States*, 271 F.2d 475 (D.C. Cir. 1959) and *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964) are consistent with both the spirit of the Sixth Amendment and the purpose of the corresponding right to question prospective jurors. The *voir dire* is meant to serve as a screening device to insure that a fair and impartial jury is empaneled. This goal is accomplished by eliciting from prospective jurors any attitudes or biases that might prejudice the defendant's right to a fair trial. In order to be effective, this process must occur *before* the jury panel is finally selected and sworn in, not afterward. And, while the district court possesses broad discretion in the conduct of *voir dire*, it is always limited by the "essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

Sellers and *Brown* hold that where a substantial part of the Government's case involves the testimony of law enforcement agents, the "essential demands of fairness" require that the court make inquiry into whether the jurors would tend to give more credence to such agents because of their status than to an ordinary lay witness.

Chief Justice Burger of this Honorable Court so ruled when he sat as Judge for the D.C. Circuit Court of Appeals in *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964). In that case, virtually every government witness was a law enforcement officer. Yet, the district court had refused to ask the prospective jurors whether they would give greater credence to the testimony of a law enforcement officer merely because he was an officer as compared to other witnesses. *Id.* at 544. Chief Jus-

tice Burger, then writing for the D.C. Court of Appeals, reversed the convictions, stating:

> "[W]hen important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be more or less inclined to credit their testimony, a query as to whether a juror would have such an inclination is not only appropriate but should be given if requested." *Brown v. United States*, *supra*, 338 F.2d at 545.

The Chief Justice went on to explain that whether or not the failure to make such inquiry is reversible error depends on the "impact which the testimony in question would be likely to have had on the jury and what part such testimony played in the case as a whole." *Id.* at 545. In *Brown*, the Government's case consisted of testimony from two military police officers who had witnessed an alleged assault by the defendant. Citing *Sellers*, Justice Burger concluded that in such circumstances, it was reversible error for the district court to refuse to make the inquiry. *Brown v. United States*, *supra*, at 545.

In the present case, all but one of the Government's many witnesses were officers or agents from various law enforcement agencies such as the FBI and the DEA. Petitioner became involved in the illegal transactions giving rise to this case by meeting and negotiating with undercover agents and informers, who taped their conversations with Petitioner and testified about what they had witnessed and discussed with Petitioner. The impact of such testimony on a jury and its importance in the Government's case was tremendous, as the court must have known it would be. Yet, the district court refused to make the simple and essential inquiry that would have enabled Petitioner to protect his right to an impartial jury. Under such circumstances, it would defy both common sense and fair play to hold that such refusal

does not seriously prejudice a defendant's Sixth Amendment rights.

Furthermore, the failure to conduct such inquiry is not cured by belated instructions to the jury. As stated earlier in this issue, the purpose of *voir dire* is not to direct, but to *elicit* potential juror bias before final selection. The view of the Seventh Circuit in *United States v. Martin*, 507 F.2d 428 (7th Cir. 1974) is consistent with this principle.

In that case, the defendant was charged with various income tax violations. The district court conducted the *voir dire* and refused the defendant's request to ask the jurors whether they would tend to believe a government agent, merely because he was an agent, over an ordinary witness. Instead, the district court instructed the entire jury panel that they were not to consider whether a witness was a government agent in determining credibility, and asked each juror whether he could be impartial. Three of the Government's four witnesses were government agents, and the defendant was convicted. On appeal, the Government argued that the district court had adequately covered the defendant's request, but the Seventh Circuit did not agree:

> "Mere admonitions, however, are not enough. The sole purpose of voir dire is not to tell potential jurors that they are to be fair and then ask them if they can be impartial. The defendant's proposed questions were meant to elicit specific attitudes and prejudices. We cannot assume that a juror would state that he could not be impartial merely because he had a close relationship with the government or a high regard for the credibility of government agents. Such questions should have been asked directly." *Id.* at 432-433

The situation before this Court is almost identical to that in *Martin*. After Petitioner's requested inquiry had been refused and the jury panel selected and sworn in, the

district court instructed the jury that in ". . . considering the weight and value of the testimony of any witnesses, you may take into consideration [the] relation of the witnesses to the Government." (T. 141-142). Again, in the district court's final charge, it stated "In weighing the testimony of a witness, you should consider his relationship to the Government or the defendant." (T. 1428). As in *Martin*, all but one of the Government's witnesses were law enforcement agents, and the district court's instructions were totally incapable of eliciting juror bias. Indeed, the circumstances before this Court are even more compelling than those in *Martin* because the district court herein waited until *after* the jury had been selected to give instructions.

Petitioner respectfully submits that those Circuits which have called the refusal of such a request an act of "judicial discretion," in the circumstances of this case and others like it, have failed to recognize that the question goes to the very heart of the Sixth Amendment and purpose of the *voir dire* examination. To require a trial court to ask the question if requested to do so, where the Government's case consists almost entirely of government agent testimony, is no more than to confine judicial discretion to the "essential demands of fairness."

For these reasons, Petitioner submits that the view of the D.C. Circuit and its followers should prevail and Petitioner's convictions reversed.

II. The court of appeals has rendered a decision in conflict with the decision of other federal courts of appeals.

Petitioner's defense at trial was entrapment. In both his points for charge and in objecting to the district court's instructions to the jury on entrapment, Petitioner, relying on *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979), requested the district court to instruct the jury that the burden of proving that Petitioner was not entrapped was upon the Government. The district

court denied these requests and instead gave only general instructions on the burden of proof in its charge to the jury. (T. 1437-1439).

On appeal, Petitioner argued to the Eleventh Circuit that the Fifth Circuit, in *United States v. Wolffs, supra*, held that when the entrapment defense is raised, the court is required to specifically instruct the jury on both the quantum of proof *and* the burden of proof in relation to that defense. Refusal to do so is reversible error. Since the Eleventh Circuit had proposed to adopt the law of the Fifth Circuit, Petitioner argued that the Fifth Circuit ruling in *Wolffs* was dispositive of the issue.

The Court of Appeals affirmed Petitioner's convictions stating:

> "In the *Wolffs* entrapment instruction, however, the court mentioned neither the reasonable doubt quantum of proof nor the party who bore that burden. In this case, the court twice referred to the reasonable quantum of proof of predisposition but did not, within the entrapment instruction, refer to the party having the burden. The court, however, gave a general instruction on burden of proof, told the jury to consider the charge as a whole, and instructed that 'the law does not require a defendant to prove his innocence or produce any evidence at all.'
>
> While it would have been better to include within the entrapment instruction itself an instruction on burden of proof, the jury instruction considered as a whole was sufficient." *United States v. Vadino*, 680 F.2d 1329, 1337 (11th Cir. 1982).

It is Petitioner's contention that in so ruling, the Eleventh Circuit seriously misinterpreted the *Wolffs* case and rendered a decision in direct conflict with the law of the Fifth Circuit, to which the Eleventh Circuit purports to be bound. The holding of the Court of Appeals below is also contrary to a number of other Cir-

cuits which have considered the issue herein. *United States v. Booz*, 451 F.2d 719 (3d Cir. 1971), *cert. denied*, 414 U.S. 820 (1973); *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966); *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977).

In *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979), the defendant was charged with various drug related offenses and asserted entrapment as a defense. Counsel therein had requested the district court to instruct the jury that the Government carried the burden of proving the defendant's predisposition to commit the crime beyond a reasonable doubt. The district court denied the request. On appeal, the Fifth Circuit overturned the conviction holding that it was reversible error to fail to so instruct the jury:

> "The language of an entrapment instruction must *unmistakably apprise the jury that the burden is upon the government* to prove beyond a reasonable doubt that, before anything at all occurred respecting the alleged offense for which the defendant is being prosecuted, the defendant was ready and willing to commit such crimes whenever an opportunity was afforded, and that the government agents did no more than offer the opportunity." (Emphasis added). *United States v. Wolffs*, *supra*, 594 F. 2d at 83.

The Fifth Circuit further ruled that a general charge on the burden of proof cannot make up for the failure to specifically instruct the jury within the context of the entrapment charge:

> " . . . we cannot assume that it [the jury] carried the advice of the general instruction into application to the instruction emphasizing the specific elements of the defense [of entrapment]." *Id.* at 83 quoting *Notaro v. United States*, 363 F.2d 169 at 176 (9th Cir. 1966).

In other words, the Fifth Circuit has ruled that when the defense of entrapment is raised, the court is required to instruct the jury (1) that the burden is upon the government to prove that the defendant was not entrapped, and (2) that the government must prove this beyond a reasonable doubt. Failure to so instruct the jury within the entrapment charge is reversible error which cannot be rectified by general instructions.

Petitioner submits that the *Wolffs* decision is quite lucid on these points, but if the Eleventh Circuit had any question about it, the case was analyzed in a compelling dissent by Judge Swygert of the Seventh Circuit in *United States v. Johnson*, 605 F.2d 1025 (7th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980). In that case, the Seventh Circuit held directly contrary to the Fifth Circuit in a nearly identical case. The defendant in *Johnson* was tried for drug offenses and asserted the entrapment defense. Counsel therein specifically requested the court to instruct the jury that the burden of proving that the defendant was not entrapped was upon the Government. The district court refused to do so and charged the jury with language that was identical to that of the district court in the present case.

The Seventh Circuit affirmed the convictions, stating that when the case is not a "close" one, and the court gives clear, general instructions on the burden of proof, it is not error to refuse to specifically instruct on the burden of proof within the entrapment charge.

In an intense dissent, Judge Swygert argued that the court's reasoning defied precedent both in and out of the Circuit and was in direct conflict with the Fifth Circuit's *Wolffs* decision.

> "The court there [in *Wolffs*] held that it was reversible error not to instruct the jury specifically *that the government has the burden* to prove beyond a reasonable doubt that there was no entrapment . . . This court's decision is in direct conflict with [the] Fifth Circuit." (Emphasis added). *Id.* at 1032.

Even the majority in *Johnson* cited the *Wolffs* case as being contra to its holding. *United States v. Johnson, supra*, at 1029.

Finally, the entrapment charge used in *Johnson* and the present case was revised in 1980 to include the sentence: "The burden is upon the Government to prove beyond a reasonable doubt that the defendant was not entrapped." *Devitt and Blackmar, Federal Jury Practice and Instructions*, §13.09 (3d Ed. Supp. 1980). The editors of the charge noted that the revision was made in light of the *Johnson* case and reflects a preference for the principles stated in *Wolffs* as opposed to those of *Johnson*.

The contrast between these two cases clearly sets off the propositon of each, and it is obvious that *Wolffs* stands for the propositon that a court must instruct on the burden of proof as well as on reasonable doubt in an entrapment charge.

Nevertheless, the Eleventh Circuit attempted to avoid the Fifth Circuit's ruling by stating that in *Wolffs*, the court had failed to instruct the jury on *both* the burden of proof and the quantum of proof, whereas in the present case, the district court merely failed to instruct on the burden of proof. *United States v. Vadino, supra*, 680 F.2d 1329 at 1337. The implication, of course, is that the *Wolffs* court would have found differently if one of these concepts had been mentioned in the charge.

But the *Wolffs* court did not hold that an instruction on either concept was sufficient. It specifically held that a district court must rule on *both*. Obviously, the quantum of proof and the burden of proof are two separate and distinct concepts, and an instruction on one does not, by any means, clarify the function of the other. That is why it is essential to instruct on both. It is thus respectfully submitted that the Eleventh Circuit's attempted distinction of *Wolffs* is completely unfounded and that the Eleventh Circuit has, in effect, embraced the reasoning and rulings of the Seventh Circuit in

Johnson and rejected those of the Fifth Circuit in *Wolffs*. Since the newly created Eleventh Circuit has purported to adopt the prior rulings of the Fifth Circuit, from which it evolved, the conflict herein presents a serious problem which is worthy of the attention of this Court.

Other circuits have ruled that *whenever* an affirmative defense is raised, be it entrapment, self-defense or alibi, the court must instruct the jury on the burden and the quantum of proof within the context of the charge given on the affirmative defense.

Thus, in *United States v. Booz*, 451 F.2d 719 (3rd Cir. 1971), *cert. denied*, 414 U.S. 820 (1973), the Third Circuit held that where a defendant asserts an alibi defense, it is reversible error for the court to refuse to instruct the jury that the Government has the burden to disprove alibi beyond a reasonable doubt. The district court's general instructions to the effect that the Government bore the burden of proving the defendant's guilt beyond a reasonable doubt, that the burden continued throughout the trial, and that it never shifted to the appellant, were incapable of curing the error. *Id.* at 723. *See also, United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1971) (failure to instruct on the burden of proof in context self-defense charge reversible error); *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966) (failure to instruct on burden of proof in entrapment defense charge reversible error dispute lucid general instructions).

Petitioner subits that for the purpose of the question presented herein, the affirmative defenses themselves are indistinguishable, and the cases are directly on point.

The reasoning behind these decisions demonstrates a strong and well-founded awareness of the fact that the very nature of an affirmative defense creates a distinct and increased likelihood of confusion by the jury with respect to who carries the burden of persuasion. This

concern is perhaps most clearly articulated by the Tenth Circuit in *United States v. Corrigan, supra*, 548 F.2d 879 at 883 where the court states:

> "We are not saying that the burden of proof should be reiterated in each separate instruction. In the case of an affirmative defense, however, the potential for misinterpretation is too great to permit ambiguity. An affirmative defense admits the defendant committed the acts charged, but seeks to establish a justification or excuse. In the absence of clear instructions, it is not unlikely that the jury would infer that the government has borne its burden and that it is up to the defendant to establish his justification. This is contrary to the standard of proof beyond a reasonable doubt on all elements of the offense; the defense of self-defense is directed toward negating the element of criminal intent. The best policy is summarized in *Notaro v. United States, supra*, at 175.
>
> 'The desire of a careful judge to avoid language which to him may seem unnecessarily repetitive should yield to the paramount requirement that the jury in a criminal case be guided by instructions framed in language which is unmistakably clear.' " (Emphasis added).

The general instructions given in the case *sub judice* were made with reference to the charges in the indictment. It is not "unmistakably clear" that those rules extended to the affirmative defense of entrapment.

Petitioner respectfully submits that the reasoning and conclusions of the Fifth, Third, Ninth and Tenth Circuits is more penetrating and more cogent than that of the Seventh Circuit, which the Court of Appeals below has apparently followed. The dangers inherent in an affirmative defense with respect to the burden of proof are not affected by the "closeness" of the case. As Judge

Swygert stated in his dissent in *United States v. Johnson:*

> "While it is true that two cases may have different circumstances, the burden of proof on the government is identical if the record contains sufficient evidence to support a finding of an affirmative defense. The burden does not shift with 'differing circumstances;' it is always the same and the rule governing instructions should be rigid." *Id.* at 1033.

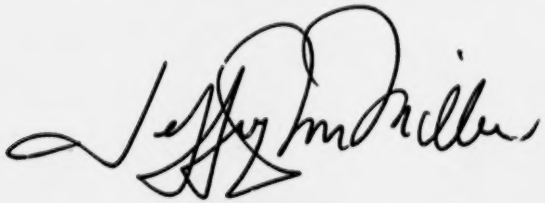
While broad discretion is generally preferred when a court charges a jury, there are instances which by their nature call for a strict rule, and the affirmative defense is one of them. The entrapment defense is an entirely different creature than the indictment. It requires a defendant to present an excuse for his actions; something which a defendant otherwise is never required to do. The confusion this situation creates in a jury's mind is not speculative, but all too real, as numerous courts have recognized. Considering the danger inherent in a refusal to give a specific charge on the burden of proof when the defense is raised, and the ease with which that danger can be averted by the court, it is certainly not too much to require a district court to instruct on the burden of proof if requested to do so.

In conclusion, petitioner submits that the Eleventh Circuit Court of Appeals has rendered a decision in conflict with the Fifth Circuit, from which it evolved, and with the Third, Ninth and Tenth Circuits. The issue involved is an important one which this Court has not considered, but should resolve in favor of the reasoning of the Fifth Circuit.

CONCLUSION

For the reasons advanced in this petition, it is respectfully submitted that a writ of certiorari should be issued to review the decision of the Court of Appeals below.

Respectfully submitted,



JEFFREY M. MILLER,
Attorney for Petitioner
FRANK J. VADINO

Dated: 1/17/83

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
DOCKET NO. 79-76-Cr-JCP

United States of America vs.

FRANK J. VADINO

DEFENDANT

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (5/75)

In the presence of the attorney for the government the defendant appeared in person on this date Sept. 2, 1980

COUNSEL

WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

WITH COUNSEL — Jeffrey Miller, Esq.

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea,

NOLO CONTENDERE,

xx NOT GUILTY

FINDING & JUDGMENT

There being a verdict of { NOT GUILTY, Defendent is discharged. / GUILTY.

Defendant has been convicted as charged of the offense(s) of combining, conspiring, confederating, and agreeing with others to violate Title 21, USC §841(a)(1), to wit: To possess with intent to distribute methaqualone and cocaine, in violation of Title 21, USC §846, as charged in Count One, and possessing with intent to dis-

tribute said substances, in violation of Title 21, USC §841(a) (1) and Title 18 USC §2 as charged in Count Two and knowingly and intentionally using a telephone to have conversations with a Federal Undercover Agent relative to distribution of methaqualone and cocaine, in violation of Title 21 USC §843 as charged in Count Six.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

EIGHT (8) YEARS or until otherwise discharged as to each of Counts One and Two, and ONE (1) YEAR or until otherwise discharged as to Count Six, said counts to run concurrently with each other (total time to be served is thus eight years), it being further

SPECIAL CONDITIONS OF PROBATION

ORDERED AND ADJUDGED that in addition to the term of incarceration, the defendant shall serve a Special Parole term of THREE (3) YEARS, as to Ct. 2 it being further

ORDERED AND ADJUDGED that the defendant shall pay a fine unto the United States of America in the sum of $2,000. as to Count One and shall stand committed until the fine is paid or until otherwise discharged by due process of law, it being further

ORDERED AND ADJUDGED that execution of sentence of confinement shall be deferred until the place of confinement and reporting date and time are designated by the United States Marshal, at which time the defendant shall surrender himself, at his own expense, to the designated institution.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant be incarcerated at Eglin AFB

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Certified as true copy on

This date _____

By _____

( ) CLERK
( ) DEPUTY

SIGNED BY JAMES C. PAINE
U.S. District Judge
U.S. Magistrate
Date Sept., 1982

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5716

D.C. Docket No. 79-00076-CR-JCP
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

FRANK J. VADINO, ELIO PEREZ-HERRERA, IVAN L. STEPHANS, EDUARDO COMESANA, RALPH NATALE,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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Before: GODBOLD, Chief Judge, RONEY and WOOD*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

July 19, 1982

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* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ISSUED AS MANDATE: NOVEMBER 17, 1982. (wls)

APPENDIX C

UNITED STATES v. VADINO
Cite as 680 F.2d 1329 (1982)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frank J. VADINO, Elio Perez-Herrera, Ivan L. Stephans, Eduardo Comesana, Ralph Natale, Defendants-Appellants.

No. 80-5716.

United States Court of Appeals,
Eleventh Circuit.

July 19, 1982.

Rehearing and Rehearing En Banc
Denied Nov. 15, 1982.

Defendants appealed from convictions in the United States District Court for the Southern District of Florida, James C. Paine, J., of conspiracy to possess narcotics; some of the defendants were also convicted of possession with intent to distribute, one defendant was convicted of use of telephone to facilitate a narcotics offense and another of carrying a firearm in connection with a felony. The United States Court of Appeals, Godbold, Chief Judge, held that: (1) defendants charged in original indictment with conspiracy to possess narcotics could validly be tried under superseding indictment, which was same as first indictment except that it added another individual as a defendant to the conspiracy charge; (2) admission against one of the defendants of

out-of-court statements by three others relating to his role in the activities did not violate the confrontation clause of the Constitution, where there was adequate independent evidence admitted before the end of trial; (3) fact that two of the defendants asserted an entrapment defense did not entitle remaining defendants to severance; and (4) trial court properly refused to allow questioning of prospective jurors concerning weight to be given a law enforcement officer's testimony.

Affirmed.

1. Indictment and Information 10.2(10), 15(5)

Superseding indictment, which was the same as first indictment charging defendants with conspiracy to possess narcotics except that it added an individual as a defendant to the conspiracy charge, was not invalid as supported only by evidence against individual added as a defendant; government was not required as a basis for the superseding indictment to re-present to same grand jury same evidence that grand jury previously had heard. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

2. Criminal Law 1167(1)

Where superseding indictment, which was the same as first indictment charging conspiracy to possess narcotics except that it added a defendant, was valid, remaining defendants were not prejudiced by fact that addition of new defendant enabled government to introduce at trial, over objections, new defendant's statements to government agent, opening up a broader scope of activities in which remaining defendants allegedly did not participate, because to extent new defendant's testimony was relevant to the conspiracy, the testimony was admissible and was prejudicial only in sense that it was probative of guilt. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

3. Criminal Law 422(1)

In prosecution of several defendants for conspiracy to possess narcotics, telephone statements to government agent by individual added by superseding indictment to conspiracy charge were not inadmissible hearsay not qualifying for coconspirator's exception with respect to two defendants asserting defense of entrapment, because their assertion of that defense constituted an admission that they committed acts constituting the offenses charged, and because the testimony in question did not relate at all to the entrapment defense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

4. Criminal Law 1169.7

Even if admission by trial court, in prosecution of several defendants for conspiracy to possess narcotics, of telephone statements to government agent by individual added by superseding indictment as a defendant to conspiracy charge was error with respect to one of the defendants, it was not reversible, because that defendant's participation in the conspiracy was established by overwhelming evidence independent of the statements in question. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

5. Criminal Law 662(1)

Admission, in prosecution of several defendants for conspiracy to possess narcotics, of out-of-court statements by three defendants against a fourth defendant relating to his role in the activities did not violate the confrontation clause of the Constitution, because the statements possessed "indicia of reliabilility," that is, they were spontaneous and supported by other evidence admitted before the end of trial. U.S.C.A.Const.Amend. 6; Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

6. Searches and Seizures 7(28)

Evidence supported finding that wife of one of the defendants voluntarily consented to government agent's entering their home. U.S.C.A.Const.Amend. 4.

7. Drugs and Narcotics 188

Affidavit supporting search warrant of home of one of the defendants sufficiently established probable cause for search of the home for narcotics and drug paraphernalia. U.S.C.A.Const.Amend. 4.

8. Searches and Seizures 7(26)

Record failed to demonstrate that defendant, in prosecution along with several others for conspiracy to possess narcotics, had such ownership or control of house where government agent answered phone call from defendant's wife so as to give him standing to object to agent's answering the telephone. U.S.C.A. Const.Amend. 4; Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

9. Telecommunications 491

Even if house where government agent answered phone call from defendant's wife was under defendant's dominion and control, Title III of the Omnibus Crime and Safe Streets Act did not bar government agent, an officer lawfully on the premises, from answering the ringing telephone. 18 U.S.C.A. §2510 et seq.; Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

10. Criminal Law 1166(6)

A codefendant's reliance on entrapment does not of itself justify reversing a refusal to sever but rather the defenses must be antagonistic to the point of being mutually exclusive.

11. Criminal Law 622(2)

Fact that two defendants in prosecution for conspiracy to possess narcotics asserted an entrapment defense did not entitle other defendants to severance, because assertion of entrapment defense was not of itself mutually exclusive or irreconcilable with defenses of other defendants, even though in opening statements counsel for the two defendants asserting entrapment admitted that most matters stated by the prosecution in its opening statement were correct, because counsel qualified their statements as being applicable only to their respective clients, and court instructed jury that they should consider each defendant's case separately. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

12. Criminal Law 622(2)

Denial of severance to remaining defendants on basis of assertion by two defendants of an entrapment defense to charge of conspiracy to possess narcotics did not violate Sixth Amendment rights of the remaining defendants under *Bruton*, because concessions stated by counsel for the two defendants asserting entrapment were not the equivalent of codefendants' statements subject to *Bruton* and the court instructed that they were not evidence at all. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

13. Conspiracy 48.1(4)

Evidence, including taped conversations between defendant and government agent, was sufficient to submit case to jury in prosecution of defendant, along with several others, for conspiracy to possess narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

14. Criminal Law 369.2(8)

Trial court, in prosecution of defendant and others for conspiracy to possess narcotics, properly admitted extrinsic offense evidence consisting of portions of telephone conversations between defendant and government agent relating to future drug transactions, because that defendant's stated willingness to do business with agent in the future bolstered defendant's statement that he was indeed a "source of supply." Fed.Rules Evid.Rules 403, 404(b), 28 U.S. C.A.

15. Criminal Law 1169.11

Any error in admission of tape recordings between defendant and government agent relating to transactions other than deal giving rise to charges against defendant and others of conspiracy to possess narcotics was not reversible. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

16. Jury 131(8)

Trial court, in prosecution of several defendants for conspiracy to possess narcotics, did not abuse its discretion in refusing to permit questioning of prospective jurors concerning weight to be given a law enforcement officer's testimony, merely because he was a law enforcement officer, as opposed to testimony of an ordinary citizen. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

17. Criminal Law 822(8)

Jury instruction on entrapment was sufficient even though it did not refer to party having burden of proof, where court gave a general instruction on burden of proof, told jury to consider charge as a whole, and instructed that law does not require defendant to prove his innocence or produce any evidence at all.

18. Criminal Law 1171.1(6)

Reference by government agents to defendants, in prosecution for conspiracy to possess narcotics, as "traffickers," "violators" and "conspirators" did not constitute reversible error. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

19. Criminal Law 858(3), 859

Trial court, in prosecution of several defendants for conspiracy to possess narcotics, properly granted jury's request to rehear taped conversations between law enforcement agents and defendants, and properly denied jury's request for written transcript of testimony of agents. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

Jeffrey M. Miller, Philadelphia, Pa., for Vadino and Natale.

Lin Brett-Major, Fort Lauderdale, Fla., for Comesana.

William R. Tunkey, Ronald A. Dion, Miami, Fla., for Perez-Herrera.

Max B. Kogen, Loren H. Cohen, Geoffrey C. Fleck, Miami, Fla., for Stephans.

Carmen C. Nasuti, Philadelphia, Pa., for Natale.

William C. Bryson, Joel M. Gershowitz, U. S. Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Circuit Judge, RONEY and WOOD*, Circuit Judges.

*Honorable Harlington Wood, Jr., Circuit Judge for the Seventh Circuit, sitting by designation.

GODBOLD, Chief Judge:

Appellants were convicted of narcotics offenses, all appellants of conspiracy to possess, 21 U.S.C. §846, and some of possession with intent to distribute, 21 U.S.C. §841(a)(1). Also, one appellant was convicted of using a telephone to facilitate a narcotics offense, 21 U.S.C. §843, and another of carrying a firearm in commission of a felony, 18 U.S.C. §924(c)(2).

Government informant Allen introduced Drug Enforcement Administration agents to appellants Vadino and Natale. Thereafter agents participated in a series of negotiations with Vadino, Natale, and appellant Stephans concerning purchase by the agents of 500,000 Quaaludes and 10 kilograms of cocaine. Appellant Comesana was present at one meeting aboard a boat. The negotiations culminated in a meeting for delivery, at a house on Jack Rabbit Lane, in Miami Lakes, Florida. Vadino, Stephans, and Comesana were present. At Stephans' direction Comesana left and returned with one kilo of cocaine, which Stephans weighed and tested. No more cocaine, and no Quaaludes, were brought to the delivery site before arrests were made.

After arrests were made at the house and while agents were still there, Agent Carew answered a telephone call from Stephans' wife. The agent told her that Stephans wanted her to "bring the stuff over." She replied that she could not because she had a runner there. Later that day agents went to the Stephans' home and entered it. The validity of this entry is questioned. A few minutes later a search warrant was issued, and pursuant to it the agents searched the house and found cocaine, Quaaludes, narcotics paraphernalia, and handwritten notes bearing the name of appellant Perez-Herrera.

While in the Stephans' house Agent Bumar answered a telephone call from Perez-Herrera, who identified himself as Stephans' "source of supply for drugs." That day and the next day Bumar conducted a series of

calls to Perez-Herrera. Tapes of these conversations were played at trial. Several of Perez-Herrera's statements, the jury could have found, related to the deal with the government agents. In the first call Bumar told Perez-Herrera he was waiting for Stephans in order to complete a drug purchase. Perez-Herrera identified himself as Stephans' source of supply for drugs and asked Bumar to have Stephans return his call. In later calls Bumar asked if Perez-Herrera had promised Stephans ten kilos of cocaine, and Perez-Herrera answered in the affirmative. Bumar referred to Stephans "promising us 10 from you," and Perez-Herrera again answered affirmatively. Also Perez-Herrera told Bumar that Stephans had called him that day and asked for 500,000 Quaaludes that the did not have. He told Bumar that he was expecting a million and a half Quaaludes the next day. The jury could have found that the ten kilos of cocaine and the Quaaludes just referred to were the subject of the deal with agents.

A statement by Perez-Herrera offering to sell Bumar anything he wanted is not referable to the deal with the agents. In a call Perez-Herrera referred to holding 100,000 Quaaludes for Stephans; possibly the jury could not relate this to the deal made with the agents.

At trial Natale and Vadino asserted the defense of entrapment; in opening statements their respective counsel acknowledged that most of the prosecutor's opening statements describing the relevant events was correct.

I. The superseding indictment; grand jury minutes

The original indictment, returned February 20, 1979, charged all appellants except Perez-Herrera with conspiracy to possess narcotics. Later, on April 4, Agent Bumar, who had talked by phone with Perez-Herrera, testified before the same grand jury concerning these conversations. The grand jury then returned a superse-

ing indictment that was the same as the first indictment except that it added Perez-Herrera as a defendant to the conspiracy charge.

[1] Natale, Vadino and Stephans contend that they could not validly be tried under the superseding indictment because it was supported by only evidence against Perez-Herrera and no evidence against them. In effect this argument is that, as a basis for the superseding indictment, the government was required to re-present to the same grand jury the same evidence that the grand jury previously had heard, otherwise there was no evidence that these appellants were participating in the same conspiracy with Perez-Herrera. No authority is cited for this proposition, and we perceive no basis for holding that the grand jury must be told a second time what it already had been told.

[2] In a variation of the same theme, these three appellants urge that they were prejudiced because adding Perez-Herrera as a defendant enabled the government to introduce at trial, over objections, Perez-Herrera's statements to Agent Bumar, which opened up a broader scope of activities in the penumbra of which they did not participate. But if the superseding indictment was valid—and we hold it was—to the extent Perez-Herrera's testimony was relevant to the conspiracy that it charged, the testimony was admissible. It was "prejudicial" in only the sense that it was probative of guilt.

Natale and Vadino argue that as a matter of law the evidence showed there were several conspiracies rather than a single conspiracy. This contention is frivolous. Alternatively they say that the jury could have found several conspiracies rather than one but was not instructed on this issue. Pretermitting whether such an instruction would have been appropriate, Natale and Vadino did not request it.

II. Admissibility of co-conspirator's statements

(A) Statements of Perez-Herrera

[3] Natale, Vadino and Stephans contend that as to them Perez-Herrera's telephone statements to Bumar were inadmissible hearsay that do not qualify for the co-conspirator's exception of F.R.Ev. 801(d)(2)E) because there was insufficient evidence to link Perez-Herrera to the conspiracy and also that when his statements were made the conspiracy had terminated by the arrest of all the conspirators known to the agents. The government concedes that it did not meet the requirements of *U. S. v. James*, 590 F.2d 575 (5th Cir.), *cert. denied* 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979) with respect to these statements.

This point means little with respect to Natale and Vadino. Their assertion of the defense of entrapment constituted an admission that they committed acts constituting the offenses charged. *See U. S. v. Brooks*, 611 F.2d 614 (5th Cir. 1980); *U. S. v. Greenfield*, 554 F.2d 179 (5th Cir, 1977); *U. S. v. Morrow*, 537 F.2d 120, 138-39 (5th Cir. 1976).[1] The testimony of Perez-Herrera did not relate at all to the entrapment defense.

[4] With respect to Stephans, admisison of Perez-Herrera's statements was not reversible error. Stephans' participation in the conspiracy was established by overwhelming evidence independent of the Perez-Herrera statements. Stephens had been at one of the initial meetings aboard a yacht, where he delivered to agents samples of cocaine and Quaaludes. He described the

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1. One count on which Natale and Vadino were convicted charges conspiracy. Under some circumstances a defendant charged with conspiracy may plead entrapment and thereby admit overt acts but deny intent to engage in conspiracy. *U.S. v. Greenfield, supra.* This exception to the general rule has no application here where respective counsel for Natale and Vadino told the jury in opening statements that the prosecutor's description of the conspiracy was substantially correct.

Quaaludes as coming from Columbia and stated that they had an excellent supply." At a later meeting on the boat Stephans quoted the price of cocaine and Quaaludes, stated the location for delivery, gave instructions for getting there, said that delivery would be in increments, and stressed the need for caution. When the group met at the Jack Rabbit Lane house for the delivery, Comesana left at Stephans' direction and returned later with a box containing a kilo of cocaine, which Stephans weighed and tested. Later that day Stephans' home was searched, and drugs and drug paraphernalia found there. Stephans offered no evidence in his defense. If admitting Perez-Herrera's telephone conversation was error, it was not reversible. Stephans was nailed without this evidence.

(B) Statements by Natale, Vadino and Stephans

[5] On *James* grounds Comesana questions the admission against him of out-of-court statements by Natale, Vadino and Stephans relating to his role in the activities. Pretermitting whether there was sufficient independent evidence to connect Comesana to the conspiracy when the testimony was admitted, there was adequate independent evidence before the end of the trial. When agents met on the boat for the first time with Vadino and Stephans, Comesana was also present. When an agent objected to Comesana's presence Vadino and Stephans explained that he was a karate expert and an expert marksman and was "Stephans' man" and was present for protection. These statements were in furtherance of the conspiracy—they were made to win acceptance by the agents of Comesana's presence and to explain his role in the conspiracy and his qualifications for it. There was other evidence that Comesana was present at the Jack Rabbit Lane house where the delivery was to take place. At Stephans' direction Comesana left the house and returned shortly thereafter with a kilo of cocaine, which Stephans weighed and tested.

Under *James* it is enough that proper foundation was laid by the end of the trial.

Admission of the statements of Natale, Vadino and Stephans did not violate the confrontation clause of the Constitution. The statements possessed "indicia of reliability"—they were spontaneous and supported by other evidence.

III. Entry into and search of Stephans' home

[6] When agents went to the Stephans' home, Mrs. Stephans answered their knock. The district court did not err in finding that she voluntarily consented to their entering.

[7] At approximately the same time other agents were obtaining a search warrant for the Stephans' house. After it was issued agents who had been waiting at the house searched the house and seized narcotics and drug paraphenalia on the authority of the warrant. The affidavit supporting the search warrant sufficiently established probable cause.

IV. Telephone calls to and from the two houses

[8] Stephans contends that agents violated Title III of the Omnibus Crime and Safe Streets Act, 18 U.S.C. §2510 et seq., and the Fourth Amendment, by receiving and making telephone calls on telephones at the Jack Rabbit Lane house and at his home on Milk Wagon Lane.

With respect to the Jack Rabbit Lane house, Stephans contends that items later seized at his home pursuant to the search warrant should have been suppressed because they were the fruits of Agent Carew's answering the phone at the Jack Rabbit Lane house and receiving the call from Stephans' wife. Assuming

arguendo that this issue was properly raised[2] we perceive no privacy interest of Stephans that was violated under Fourth Amendment standards. Stephans was not a party to the conversation with Carew. When Carew answered the ringing phone the caller identified herself as Stephans' wife and freely talked to Carew. The record does not reveal that Stephans had such ownership or control of the Jack Rabbit Lane house as might arguably give him standing to object to Carew's answering the telephone.

[9] Even if the Jack Rabbit Lane house was under Stephans' dominion and control—which was not satisfactorily established—Title III does not bar Bumar, an officer lawfully on the premises, from answering the ringing telephone. *U. S. v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979).

With respect to the Milk Wagon Lane house, Stephans conceded at trial that he did not question the validity of Agent Bumar's receiving the first incoming call from Perez-Herrera. Several calls were later made by Bumar to Perez-Herrera and were recorded. It appears that two of them originated from the Miami DEA office. The origin of the remaining four is not entirely clear, but assuming they originated at (and were recorded from) the Milk Wagon Lane house, we have already held in part II(A) that admission of Perez-Herrera's statements was not reversible error with respect to Stephans because his guilt was established by overwhelming independent evidence.

V. Severance

[10] Stephans, Comesana, and Perez-Herrera contend they were entitled to severance because the entrapment defense offered by Natale and Vadino was

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2. Stephans did not before or at trial move to suppress Carew's conversation with Mrs. Stephans, as required by F.R.Crim.P. 12(b)(3) & (f).

antagonistic and mutually exclusive to their defense. A co-defendant's reliance on entrapment does not of itself justify reversing a refusal to sever but rather the defenses must be antagonistic to the point of being mutually exclusive. *U. S. v. Salomon*, 609 F.2d 1172, 1173 (5th Cir. 1980).

[11] The assertion by Natale and Vadino of their entrapment defense was not of itself mutually exclusive or irreconcilable with defenses by other defendants. The other defendants do not contend that Natale or Vadino offered evidence tending to incriminate them. Assertion of an entrapment defense may tend to bolster the credibility of prosecution witnesses, a point made by Perez-Herrera, but this is not enough to require severance, especially when the government's evidence is essentially uncontradicted. *See, e.g., U. S. v. Eastwood*, 489 F.2d 818, 821-22 (5th Cir. 1973); *U. S. v. Russo*, 455 F.2d 1225 (5th Cir.) *cert. denied*, 409 U.S. 846, 93 S.Ct. 49, 34 L.Ed.2d 86 (1972).

Nor were the other defendants entitled to severance because in opening statements counsel for Natale and Vadino admitted that most of the matters said by the prosecution in its opening statement were correct. Counsel for Natale and Vadino qualified their statements as being applicable to only their respective clients. The court instructed the jury that they should consider the case of each defendant separately.

[12] The denial of severance did not violate the Sixth Amendment rights of other defendants under *Bruton v. U. S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and *DeLuna v. U. S.*, 308 F.2d 140 (5th Cir. 1962). The concessions stated by counsel for Natale and Vadino were not the equivalent of co-defendants' statements subject to *Bruton*, and indeed, the court instructed that they were not evidence at all. *DeLuna* concerns severance where a defendant has a need to comment on the silence of a co-defendant, but the

defenses of the two must be truly antagonistic rather than merely inconsistent.

Perez-Herrera was not, for reasons peculiar to him, misjoined under Criminal Rule 8(b) and 14, and the court did not err in denying him a severance. The evidence with respect to him, discussed below in Part VI, permitted the jury to infer that he was the supplier of the cocaine and the Quaaludes to be delivered to the agents in the sale and delivery in which the other conspirators were directly participating.

VI. Sufficiency of the evidence

[13] The court did not err in denying Perez-Herrera's motions for judgment of acquittal. The strong evidence against him was the taped conversations between him and Agent Bumar. We have described in the first part of this opinion the content of the calls and the parts that the jury could have found were the subject of the deal with the agents. This evidence was sufficient to submit the case to the jury. Moreover, the handwritten notes found in the trash compactor at the Stephans' home tied Perez-Herrera to Stephans. One said "Ellio (at home). Good news [with a line drawn through these two words]." Ellio is Perez-Herrera's first name. The other said "Ellio in!! [underlined five times]." One note indicated that Perez-Herrera had called twice.

VII. Evidence of extrinsic offenses by Perez-Herrera

[14] Perez-Herrera objected to admission of the portions of his telephone conversations with Bumar relating to future drug transactions. This evidence was admissible under F.R.Evid. 404(b) and 403. Perez-Herrera's stated willingness to do business with Bumar in the future bolstered Perez-Herrera's statement that he was indeed a "source of supply," which he had identified himself as being.

[15] Assuming that Perez-Herrera's objections were sufficient to reach the parts of the tapes that related to transactions, present and past and other than the deal with the agents, admitting these portions was not reversible error. Possibly the jury could not find that the reference to holding 100,000 Quaaludes for Stephans was related to Stephans' order for 500,000 Quaaludes, but in the context of the order for 500,000, and of Perez-Herrera's statement that he was expecting a million and a half Quaaludes the next day, the reference to a separate deal with Stephans for 100,000 Quaaludes is of minimal significance.

VIII. Voir dire of jury

[16] All appellants except Comesana urge as error the refusal of the court to permit questioning of prospective jurors concerning the weight to be given a law enforcement officer's testimony, merely because he is a law enforcement officer, as opposed to the testimony of an ordinary citizen. Such questioning would have been of little consequence except to Stephans. Natale and Vadino were asserting that they were entrapped by the non-officer informer Allen, who set them up with government agents. The case against Perez-Herrera depended largely on the tapes of his telephone conversations with Bumar. In any event, we are bound by the rule of the former Fifth Circuit[3] in *U. S. v. Jackson*, 448 F.2d 539, 542-43 (5th Cir.) *cert. denied* 404 U.S. 1063, 92 S.Ct. 750, 30 L.Ed.2d 752 (1972), and *U. S. v. Gassaway*, 456 F.2d 624, 626 (5th Cir. 1972), that such a refusal is not an abuse of discretion. Other circuits agree.[4]

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3. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (all Fifth Circuit cases decided before close of business September 30, 1981 binding on Eleventh Circuit).

4. *Gorin v. U. S.*, 313 F.2d 641 (1st Cir. 1963); *U. S. v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *Ross v. U. S.*, 374 F.2d 97 (8th Cir. 1967).

IX. Instructions to jury on entrapment

[17] The jury instruction on entrapment is set out in the margin.[5] Natale and Vadino objected and asked the court to instruct that the burden of proving that they were *not entrapped* was on the government. The paragraph beginning "if, then, the jury should find . . ." says, paraphrasing, that if the jury finds beyond reasonable doubt that defendants were predisposed and that governmental participation was no more than the offer of an opportunity, then defendants were not entrapped. The next paragraph says, paraphrasing, that if the evidence leaves the jury with reasonable doubt whether defendants were predisposed, then they are to be found not guilty.

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5. Certain defendants assert that they were victims of entrapment as to the offense charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents, or informants, to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment.

For example, it is not entrapment for a Government agent to pretend to be someone else, and to offer, either directly or through an informer, or other decoy, to engage in an unlawful transaction.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as charged in the indictment, whenever opportunity was afforded, and that Government offciers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

Defendants rely upon *U. S. v. Wolffs*, 594 F.2d 77 (5th Cir. 1979), in which the court reversed for a faulty charge on entrapment. In the *Wolffs* entrapment instruction, however, the court mentioned neither the reasonable doubt quantum of proof nor the party who bore that burden. In this case the court twice referred to the reasonable quantum of proof of predisposition but did not, within the entrapment instruction, refer to the party having the burden. The court, however, gave a general instruction on burden of proof, told the jury to consider the charge as a whole, and instructed that "the law does not require a defendant to prove his innocence or produce any evidence at all."

While it would have been better to include within the entrapment instruction itself an instruction on burden of proof, the jury instruction considered as a whole was sufficient.

X. Miscellaneous issues

Other issues may be disposed of summarily, some without comment.

[18] In testimony DEA agents referred at times to appellants as "traffickers," "violators" and "conspirators" and the group as the "Natale organization." To the extent these descriptions were subject to objection at all, they were clearly not reversible.

[19] Even if the matter was properly raised, it was not error for the court to grant the jury's request to rehear taped conversations between agents and defendants but to deny the jury's request for written transcript of testimony of agents.

Comesana's argument that opening statements of counsel for Natale and Vadino, see part V, *supra*, were comments upon his Fifth Amendment right to remain silent is totally meritless.

The convictions are AFFIRMED.

APPENDIX D

UNITED STATES v. VADINO

UNITED STATES of America,
Plaintiff-Appellee,

v.

Frank J. VADINO, Elio Perez-Herrera, Ivan L. Stephans, Eduardo Comesana, and Ralph Natale, Defendants-Appellants.

No. 80-5716.

United States Court of Appeals,
Eleventh Circuit.

Nov. 15, 1982.

Defendants appealed from convictions in the United States District Court for the Southern District of Florida, James C. Paine, J., conspiracy to possess narcotics. The Court of Appeals, 680 F.2d 1329, affirmed. On petitions for rehearing and petitions for rehearing en banc, the Court of Appeals held that the trial court's admission of one defendant's telephone statements to a government agent against another defendant was harmless error beyond a reasonable doubt.

Petitions denied.

Criminal Law 1169.7

In prosecution of several defendants for conspiracy to possess narcotics, trial court's admission of one defendant's telephone statements to government agent against another defendant was harmless error beyond a reasonable doubt.

Appeals from the United States District Court for the Southern District of Florida.

ON PETITIONS FOR REHEARING AND
PETITIONS FOR REHEARING
EN BANC

(Opinion July 19, 1982, 11 Cir., 1982,
680 F.2d 1329)

Before GODBOLD, Chief Judge, RONEY and WOOD*, Circuit Judges.

PER CURIAM:

We said with respect to Stephans that his participation in the conspiracy was established by overwhelming evidence independent of the Perez-Herrera statements. We recited that independent evidence. To erase any doubt of what we meant by our holding, admissibility of the Perez-Herrera statements against Stephans was harmless error beyond reasonable doubt under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The petitions for rehearing of Stephans, Comesana, Natale and Vadino are DENIED, 680 F.2d 1329, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestions for Rehearing En Banc of Stephans, Comesana, Natale and Vadino are DENIED.

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*Honorable Harlington Wood, Jr., U. S. Circuit Judge for the Seventh Circuit, sitting by designation.

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